IN RE KAH WAI VIDEO (IPOH) SDN. BHD.

[R.Cr.J. (Edgar Joseph Jr. J.) June 29, 1985]

[Ipoh – Criminal Revision No. 25 of 1985]

Copyright – Seizure of articles – Search warrants issued by Magistrate – Return of unscheduled articles to owner – Whether Magistrate has power to make order – Whether unlawful exercise of discretion by Magistrate – Application for and execution of search warrants – Principles – Criminal revision – Copyright Act, 1969, s. 15.

Criminal Law and Procedure – Application for an execution of search warrants generally – Principles.

Police – Copyright – Warrant of arrest under Copyright Act, 1969, s. 15(1) – Seizure of scheduled and unscheduled articles – Powers of police – Implied extension of powers under warrant and common law.

Jurisdiction – Copyright – Warrants of arrest under Copyright Act, 1969, s. 15(1) – Seizure of scheduled and unscheduled articles – Whether seizure of latter illegal – Issuing magistrate ordered return of unscheduled articles – Whether beyond his power.

In this case, the Magistrate issued an order requiring the return to the owner of some of the articles seized by the police at Ipoh by virtue of two search warrants, in the form prescribed under the Criminal Procedure Code, which he had earlier issued in consequence, in each case, of an information on oath made pursuant to the provision of section 15(4) of the Copyright Act, 1969. The effect of the information was that the informants had good cause to suspect that offences under section 15(1) of the Act had been committed. Subsequently, Kah Wai Video (Ipoh) Sdn. Bhd. came forward to claim certain articles seized but not specified in the search warrant. After hearing arguments in open court, the issuing Magistrate made the said order requiring the return of the articles to the owner through the police. Two questions involved are: (1) Whether it was beyond the powers of the Magistrate to have made the order and (2) Whether, even if he had the necessary power to do so, the making of the order was unlawful exercise of discretion within the principles enunciated by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation.*(1)

Held: (1) the issuing Magistrate had neither the power nor the authority to direct the return of the unscheduled articles seized by the police authorities to the owners even if he had second thoughts about the propriety of his having issued the warrants of search in the first place;

(2) if the issuing Magistrate had the power to make the order for return of the unscheduled articles, then on the facts he ought not to have exercised the power in the manner he did because there was no illegal seizure;

(3) having regard to the circumstances of this case, the police were authorized to seize and remove the unscheduled articles by virtue of the implied extension of powers under the warrant and/or the extension of their common law powers subject to the limitations imposed by section 15(4)(b);

(4) they were also authorized to retain them in their custody and control to facilitate investigations into offences under section 5(1) subject, of course, to the limitation imposed by section 15(4)(b);

(5) in any event, even if the police authorities are not authorized to conduct the search or to effect a seizure they may be open, at most, to some sort of civil action. But this is a far cry from saying that a prosecution will not lie under section 15(1) where there has been an illegal seizure of infringing copies;

(6) the order of the Magistrate directing the return of the unscheduled articles was quashed and substituted in its place an order that the police authorities be authorized to retain custody and control thereof to facilitate investigations into possible offences in contravention of section 15(1). The order made by the issuing Magistrate as regards the scheduled articles was varied so as to enable the police authorities to continue to retain custody and control thereof, to facilitate investigations into possible offences in contravention of section 15(1).

[*Editorial Note:* The principles as to the application for the execution of search warrants have been enunciated in the judgment.

The Supreme Court had, on August 19, 1985, in Supreme Court Criminal Application No. 15/85 made pursuant to the provision of section 66(1), Courts of Judicature Act, 1964, refused leave to Kah Wai Video (Ipoh) Sdn. Bhd. to appeal to the Supreme Court against the Judgment of Edgar Joseph Jr. J. Further the Supreme Court had also on March 24, 1986 in Supreme Court Criminal Appeal No: 24/85 dismissed an appeal lodged by the same Kah Wai Video (Ipoh) Sdn. Bhd. in respect of the same judgment following a preliminary objection by the Senior Federal Counsel for the respondents that the appeal was incompetent, no leave having been obtained.]

Cases referred to:

(1) *Associated Provincial Picture Houses Limited* v. *Wednesbury Corporation* [1948] 1 K.B. 223.
(2) *Foo Loke Ying & Anor.* v. *Television Broadcasts Ltd. & Ors.* [1985] 2 M.L.J. 35.
(3) *The New Swadeshi Mills of Ahmedabad Ltd.* v. *S.K. Rattan & Ors.* I.L.R. (1968) Guj. 117.
(4) *Re Elias Smat* (1888) 1 S.L.J. 30.
(5) *R.* v. *Rearden* 4F. & F. 76; 176 E.R. 473.
(6) *Frank Truman Export* v. *Metropolitan Police Commissioner* [1977] 3 All E.R. 431 & 438.
(7) *Ghani* v. *Jones* [1970] 1 Q.B. 693, 708, 709.
(8) *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 2 Q.B. 299, 313.
(9) *Public Prosecutor* v. *Then Mee Kom* [1983] 2 M.L.J. 344.
(10) *Kuruma* v. *R.* [1955] A.C. 197.
(11) *Saminathan* v. *Public Prosecutor* [1937] M.L.J. 39.
(12) *Elias* v. *Pasmore* [1934] 2 K.B. 164.
(13) *R.* v. *Lushington; Ex parte Otto* [1894] 1 Q.B. 420.
(14) *Beardsley* v. *Giddings* [1904] 1 K.B. 847.
(15) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.
(16) *Sharma & Ors.* v. *Satish Chandra* A.I.R. 1954 S.C. 300.
(17) *Herniman* v. *Smith* [1938] A.C. 305.
(18) *Hope* v. *Evered* (1886) 17 Q.B.D. 338.
(19) *Utting* v. *Berney* (1888) 52 J.P. 806.
(20) *Lea* v. *Charrington* (1889) 23 Q.B.D. 45.

(21)*Galliard* v. *Laxton* (1862) 2 B. & S. 363; 121 E.R. 1109.
(22)*Codd* v. *Cabe* (1876) 1 Ex. D. 352.

CRIMINAL REVISION.

Hira Singh for Kah Wai Video (Ipoh) Sdn. Bhd.

Miss Su Geok Yiam (Deputy Public Prosecutor) for Inspector Abdul Ghani and Chief Police Officer, Perak.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This revision was concerned with the validity and the legal propriety of an order made by a Magistrate, requiring the return to the owner of some of the articles seized by the police authorities at Ipoh by virtue of two warrants of search he had earlier issued, under his hand, in consequence, in each case, of an information upon oath made pursuant to the provisions of section 15(4) of the Copyright Act, 1969 ("the Act").

By way of amplification, I must add that the issues which arise will be treated as involving two distinct questions, namely: (1) Whether it was beyond the powers of the issuing Magistrate to have made the order concerned and (2) Whether, even if he had the necessary power to do so, the making of the order was an unlawful exercise of discretion within the principles enunciated by Lord Greene M.R. in *Associated Provincial Picture Houses Limited* v. *Wednesbury Corporation.*[1]

The first question concerns the jurisdiction of the Magistrate and raises a point of pure statutory construction. The second question involves two issues:

(a) Whether the exercise of discretion was unlawful or

(b) Whether in making the order relevant considerations were not taken into account or irrelevant considerations were taken into account or there was a misdirection as to law.

It will make for brevity and convenience if I state, at once, that all references in this judgment to sections shall, unless otherwise stated, be to the Act.

The articles whose return to the owner the Magistrate had ordered did not fall within the precise limits of the schedules to the search warrants, so I shall refer to these as "the unscheduled articles." The rest of the articles however did, so I shall refer to these as "the scheduled articles."

It is necessary to enumerate, at least generally, "the scheduled" and "the unscheduled" articles actually seized and I would do so as follows:

The Scheduled Articles: 148 video tapes believed by the police authorities to be infringing copies of designated films (with names of film titles stated) published in Malaya on specified dates within one month of their publication in Hong Kong and thus qualifying for copyright in Malaysia under the Act – see *Foo Loke Ying & Anor.* v. *Television Broadcasts Ltd. & Ors.*[2]

The Unscheduled Articles: (a) 50 Video Casette Recorders (b) 22 Customer Cards (c) 1 Programme List (d) 4 Boosters (e) 1 Pause (f) 1 Equalizer (g) 1 National Quintrix Television (h) 1 box of Wire.

The starting point of my examination of the legal position regarding the questions for decision are section 15(1) and 15(4). The former provision creates offences whilst the latter contains the requirements as to which the Magistrate had to be satisfied before he could authorise the issue of the warrants and limitations as to time for the institution of prosecutions.

Section 15(1) provides:

"Any person who at a time when copyright subsists by virtue of this Act in a work –
(a) makes for sale or hire any infringing copy; or
(b) sells, lets for hire or by way of trade exposes or offers for sale or hire any infringing copy; or
(c) distributes infringing copies; or
(d) possesses, otherwise than for his private and domestic use, any infringing copies; or
(e) by way of trade exhibits in public any infringing copy; or
(f) imports into Malaysia, otherwise than for his private and domestic use, any infringing copy; or
(g) makes or has in his possession any contrivance capable of being used for the purpose of making infringing copies,
shall, unless he proves that he acted in good faith and had no reasonable grounds for supposing that copyright would or might be thereby infringed, be guilty of an offence.

Section 15(4) provides:

"If information is given upon oath to any magistrate that there is reasonable cause for suspecting that there are in any house, premises, vessel or other place any infringing copies (or any contrivance used or intended to be used for making infringing copies) by means of or in relation to which any offence under sub-section (1) of this section has been

committed, he may issue a warrant under his hand by virtue of which any police officer named or referred to in the warrant may enter the house, premises, vessel or other place at any reasonable time by day and search for and seize any such copy or contrivance; and if a copy or contrivance is seized under this sub-section in connection with an offence and –

(a) in proceedings brought under this section in connection with the offence no order is made under sub-section (2) of this section as to the copy or contrivance; or

(b) no such proceedings are instituted within six months of the seizure,

the copy or contrivance shall be returned to the person in whose possession it was when it was seized or, if it is not reasonably practicable to return it to that person, shall be disposed of in accordance with the law regulating the disposal of lost or unclaimed property in the hands of police authorities."

In order to elucidate the matter, I shall next narrate briefly, what I consider to be the material facts, which led to the issue of the warrants.

On May 21, 1985, two informations against the proprietor/occupier of No. 26 and 26A, Jalan New Pasir Putih, Ipoh, Perak ("the two premises") were laid on oath by Kah Wai Hoe, an employee of Syarikat Progress Trading and Riduan bin Hashim, an employee of Classic Video Programmes Sdn. Bhd. respectively. I do not propose to set out the contents of those information copies of which are in the Court file. It is sufficient to say that their effect was that both the informants had, what may be considered, good cause indeed to command suspicion that offences under section 15(1) had been committed. They based their conclusions on investigations carried out by their principals of which they said they had personal knowledge and they averred that they were duly authorized to lay the informations concerned. They also annexed documentary evidence, in the form of agreements, which suggested that their principals were owners of the copyright concerned within the meaning of section 2 which provides, *inter alia:*

"Owner of the Copyright means the first owner, an assignee or exclusive licensee, as the case may be, of the relevant portion of the Copyright."

Now, it will be recalled that all that section 15(4) requires for the issue of a warrant of search is that the Magistrate must be satisfied that the informant has *"reasonable cause for suspecting"* that there are in any premises. . . any infringing copies ("or any contrivance used or to be used for making infringing copies) or capable of such use etc." (emphasis supplied). The word "copy" is defined in section 2 to mean a reproduction of a word in written form, in the form of a recording or cinematograph film, or in any other material form. "Contrivance" within the meaning of section 15(1)(g) is one capable of use for the purpose of making infringing copies.

It is trite law that the words "to believe" must be distinguished from the words "to suspect." To believe a fact is to regard the fact as true; whereas "to suspect" would imply a readiness to believe without sufficient data. It would introduce, to some extent, the element of imagination or conjecture. The word "believe" cannot be equated with the word "suspect": *The New Swadeshi Mills of Ahmedabad Ltd.* v. *S.K. Rattan & Ors.*[3]

In the event, the Magistrate issued the two search warrants concerned authorizing the Chief Police Officer for the State of Perak and Inspector Abdul Ghani bin Hassan to search the two premises for certain articles specified in the schedules thereto, as their production was essential to enquiries being made (or about to be made) into offences in contravention of section 15(1).

The form of warrant issued in each case was that prescribed under the Criminal Procedure Code. I consider that that was perfectly in order since there is in fact no prescribed form of warrant of search under the Act.

With respect, I see nothing in the point the issuing Magistrate had made when writing to this Court to exercise its powers of revision on the ground that the search warrants were in improper form. What was of course more important was whether the requirements of the Act under which the warrants of search were issued had been fulfilled. I have already said why I consider that there had been sufficient compliance for this purpose.

Reverting to the narrative of events, on the same day the warrants of arrest were issued, in the day time, Inspector Abdul Ghani led a party of police personnel and carried out a raid on the two premises. Then followed a search and seizure of the scheduled and the unscheduled articles aforesaid. He then made an endorsement on the back of both warrants confirming the action he had taken. Three days later, he appeared before the issuing Magistrate and the following order was made:

"Items 1 – 9 of 1st Search List to be kept in Court Custody as they are in the Schedule. Items 10 – 11 to be returned to the police. All items in 2nd Search List (except the 50 tapes) to be released to the police. Items in Schedule to be retained by police for one week to verify whether they are infringing copies. Copy of the certificate to be given to Court."

At this point, an incorporated company known as Kah Wai Video (Ipoh) Sdn. Bhd. surfaced. Its solicitors, M/s Asbir, Hira Singh & Co. wrote a letter dated May 25, 1985, addressed to the Deputy O.C.P.D. Crime (Ipoh), as follows:

"We act for Kah Wai Video (Ipoh) Sdn. Bhd. of 26, Jalan New Pasir Puteh, Ipoh. The premises were searched by a police officer, Inspector Abdul Ghani bin Hassan, 1/9218, together with a large number of personnel, two of whom identified themselves as Francis Yap and Lee Mook Kwai. They seized goods indiscriminately regardless whether they were within the ambit of the search warrant.

Yesterday, the learned President, Mr. Augustine Paul, ruled that Items seized other than those specified in the search warrant schedule should not have been seized. These Items are now in the possession of the police and are being detained illegally.

We shall be grateful if you will be so kind to inform us as to when and where you propose to return these Items seized as a consequence of the above search warrant. As a matter of urgency, you may contact our Hira Singh by phone whereupon we shall instruct our clients to make necessary arrangements for the goods to be taken from your custody at the agreed time and place."

This letter evoked a response dated May 29, 1985, from the D.P.P., Ipoh, addressed to the issuing Magistrate, in which she argued that the police authorities required the unscheduled articles as exhibits in criminal proceedings "against the owner who could not then be traced." She urged that their continued detention was not illegal and that section 15(4)(d) authorised the police to do so for a period of up to six months, pending a decision whether or not to prosecute.

She further urged, that as regards the Scheduled Items which were ordered to be kept in Court custody, they should be transferred to police custody, to facilitate investigations with a view to prosecution for offences under section 15(1).

The result of this correspondence was that the issuing Magistrate heard arguments in Open Court from counsel for Kah Wai Sdn. Bhd. and the learned Deputy on June 4, 1985 and, at the conclusion thereof, made the following orders:

'Items not in Schedule: To be released to owner through police.

Items in Schedule : No order. Police to continue to be in custody pending ruling from High Court."

The upshot of these orders may be stated shortly. The issuing Magistrate had second thoughts as to whether he ought to have issued the search warrants. So he wrote to the learned judge of the High Court, Ipoh, with a view, if necessary, to the orders being revised.

In his letter, the issuing Magistrate expressed the opinion that "it would appear that the information on oath is defective" and also the search warrants issued were in "improper form." He concluded by saying, "I thought it fit to refer to the above for your Lordship's consideration in the interest of justice which ought to prevail over personal embarrassment."

Similarly, counsel for Kah Wai Sdn. Bhd. and the learned Deputy also referred the matter to the High Court, Ipoh, the former by notice of motion and the latter by letter.

It was in these circumstances that the matter came before me for hearing.

At the outset, I made it clear that I would treat the hearing before me as a Criminal Revision under Chapter XXXI of the Criminal Procedure Code.

This brings me to a consideration of the question of the validity of the order made by the issuing Magistrate directing the return to the owner of the unscheduled articles.

In my opinion, the issuing Magistrate had neither the power nor the authority to direct the return of the unscheduled articles seized by the police authorities to the owners even if he had second thoughts about the propriety of his having issued the warrants of search in the first place.

Nowhere in the Criminal Procedure Code or elsewhere is there any provision enabling the issuing Magistrate to make the order he did in fact make. The case of *Elias Smat*[4] which was cited to me as authority for the proposition that a Magistrate has power to order goods in the possession of the police under a search warrant to be delivered to the apparent owner, I would regard as of no assistance because the basis of that decision was section 36 of the Indian Act, 13 of 1856 which expressly conferred such power upon a Magistrate.

On the contrary, it is my opinion that the issuing Magistrate in this case could in no way brush aside the explicit provisions of section 15(4)(b).

Accordingly, the order of the issuing Magistrate directing the return of the unscheduled articles to the owner was illegal, void and of no effect.

Alternatively, if contrary to my primary opinion, the issuing Magistrate had the power to make the order for return of the unscheduled articles then, on the facts, I would hold, that he ought not to have exercised the power in the manner he did because I do not consider that there was in this case an illegal seizure.

My conclusion as regards this part of the case is based on two separate grounds.

In the first place, having regard to the circumstances of this case, I find that Inspector Abdul Ghani bin Hassan had reasonable grounds for believing and obviously did believe that the unscheduled articles constituted material evidence in relation to the crime for which he entered the two premises or they showed implication in some other offences of the same kind.

Where there are other offences of the same kind which are all part of one and the same transaction, evidence thereof is properly admissible: see *R.* v. *Rearden.*[5]

In so concluding, I also had regard to the unpredictability of the course of a criminal trial and the risk to the administration of justice if the unscheduled articles are not available as evidence.

If I am correct in this, then by virtue of an implied extension of the powers under the warrant, the police authorities were authorised to seize the unscheduled articles subject to the limitations imposed by section 15(4)(b).

As regards the implied extension of powers under the warrant, I find support in the following passages in the judgment of Swanwick J. in *Frank Truman Export* v. *Metropolitan Police Commissioner*[6]:

"In *Chic Fashions (West Wales) Ltd.* v. *Jones* the police entered the premises of the company under a warrant authorising them to search for stolen clothes made by a named company. They found and seized stolen clothes made by other companies. The Court of Appeal held that they were justified. Lord Denning M.R. cited a number of cases, including *Elias* v. *Pasmore*, and also a Scottish case, *Pringle* v. *Bremner and Stirling*, from which he deduced the proposition that, in the interests of finding out wrongdoers and repressing crime, the judges had extended the authority of the warrant at least this far:

'In my opinion, when a constable enters a house by virtue of a search warrant for stolen goods, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him.'

Although Salmon L.J. inclined to the view that the policeman's rights depended on whether the person in whose possession the goods were found was criminally implicated or not, and Diplock L.J. reserved his views on that question, all the members of the court agreed that the policeman was justified: and I find it difficult to see how this result was achieved except by some implied extension of the powers under the warrant. In *Pringle* v. *Bremner and Stirling* the extension was to other matters tending to prove that the goods were stolen. I feel constrained by these authorities to apply this test to the one document in the second category, whether privileged or not. I therefore refuse relief in respect also of this document."

In the second place, for the reasons just stated, apart from the implied power under the search warrant, at common law too, the police authorities were authorised to seize the unscheduled articles subject again to the limitations imposed by section 15(4)(b).

As regards the common law extension of police powers to seize articles which do not fall within the precise limits of the search warrant issued, I find support in the following passages in the judgment of Denning M.R. in *Ghani* v. *Jones*[7]:

"What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied:

'First: The police officers must have reasonable grounds for believing that a serious offence has been committed – so serious that it is of the first importance that the offenders should be caught and brought to justice.

'Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by the criminals in the Great train robbery).

'Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

'Fourth: The police must not keep the article, nor prevent

its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

'Finally: The lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards."

And, earlier at page 706, Lord Denning in considering the right of the police to take possession of documents they might come across in the search being executed under the authority of the warrant but which did not fall within the category of documents mentioned in the warrant said this:

"I take it to be settled law, without citing cases, that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come upon any other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary."

In *Chic Fashions (West Wales) Ltd.* v. *Jones*,[8] Lord Denning again dealt with the common law powers of the police to seize.

The following passage in his judgment merits reproduction:

"We have to consider, on the one hand, the freedom of the individual. The security of his home is not to be broken except for the most compelling reason. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. In these present times, with the ever-increasing wickedness there is about, honest citizens must help the police and not hinder them in their efforts to track down criminals. I look at it in this way: So far as a man's individual liberty is concerned, the law is settled concerning powers of arrest. A constable may arrest him and deprive him of his liberty, if he has reasonable grounds for believing that a felony (now an 'arrestable offence') has been committed and that he is the man. I see no reason why goods should be more sacred than persons. In my opinion, when a constable enters a house by virtue of a search warrant for stolen goods, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him. Test it this way: Suppose the constable does not find the goods mentioned in the warrant but finds other goods which he reasonably believes to be stolen, is he to quit the premises and go back to the magistrate and ask for another search warrant to cover these other goods? If he went away, I should imagine that in nine cases out of ten, by the time he came back with a warrant, these other goods would have disappeared. The true owner would not recover them. The evidence of the crime would have been lost. That would be to favour thieves and to discourage honest men. Even if it should turn out that the constable was mistaken and that the other goods were not stolen goods at all, nevertheless so long as he acted reasonably and did not retain them longer than necessary, he is protected. The lawfulness of his conduct must be judged at the time and not by what happens afterwards."

Applying the principles enunciated in the cases of *Frank Truman* and *Ghani*, I am satisfied, having regard to the circumstances of this case, that the police were authorised to seize and remove the unscheduled articles by virtue of the implied extension of powers under the warrant and/or the extension of their common law powers. They were also authorised to retain them in their custody and control to facilitate investigations into offences under section 15(1), subject, of course, to the limitation imposed by section 15(4)(b).

The remaining points in this Revision can be disposed of shortly.

Counsel for Kah Wai Sdn. Bhd. referred me to a *dictum* of Ajaib Singh J. in *Public Prosecutor* v. *Then Mee Kom*[9] which reads:

"Proceedings under s. 15(1) of the Copyright Act can only commence if the infringing copies are lawfully seized under s. 15(4) and not otherwise. Therefore, the arrest of the Accused on July 7, 1981, on a warrant of arrest and all subsequent proceedings were invalid."

With respect, I cannot agree with this *ex cathedra* pronouncement.

More than 30 years ago, Lord Goddard in delivering the advice of the Judicial Committee of the Privy Council, in the celebrated case of *Kuruma* v. *R.*[10] said, *inter alia:*

"The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

His Lordship was, of course, not making new law when he penned those oft-quoted words for the principle he referred to was well-settled, in this country, long before that (see, for example, *Saminathan* v. *Public Prosecutor*[11] per Aitken J.).

The effect of holding that proceedings under section 15(1) can only commence if the infringing copies are lawfully seized must be to drain the principle enunciated in *Kuruma's* case of all its vitality. The only bar against a prosecution under section 15(1) is where a period of six months has elapsed since the seizure of the infringing copies or contrivance concerned without the institution of such proceedings.

Clearly, if the prosecution are at liberty to adduce evidence of the recovery of the articles seized as a result of an illegal search, this must imply the right to prosecute and, for this purpose, to retain exhibits seized which are capable of being used in evidence at the trial.

In *Elias* v. *Pasmore,*[12] a warrant to arrest one Hannington for seditious speeches was executed at Elias's home and incriminating documents were found on Elias and Hannington which were capable of being used and in fact were used at their trial. It was held that although the seizure was outside the strict terms of the warrant, it was excused because it was in the interests of the State that the document should be preserved. It follows that the police may retain such documents for use in Court against the person arrested or anyone else until the trial is concluded: *R.* v. *Lushington; Ex parte Otto.*[13]

I might add that in *Elias* v. *Pasmore,* Horridge J. had expressed the view that the legality of the documents seizure depended on whether the documents were in fact used in evidence. However, in the *Chic Fashion's* case, Lord Denning rejected this when he said at p. 312:

"It will be noticed that Horridge J. relied on the fact that the documents were used in evidence at the trial. But I cannot think that it is a necessary condition to justify their seizure. It may often happen that, on investigation, the prosecution decide not to go on with the case. The seizure must be justified at the time, irrespective of whether the case goes to trial or not. It cannot be made lawful or unlawful according to what happens afterwards."

The position is *a fortiori* in the case of prosecutions under section 15(1) which expressly empowers the police authorities to retain custody and control of the articles seized for a period of up to six months after seizure if no proceedings are instituted: section 15(4)(b).

In any event, even if the police authorities are not authorised to conduct the search or to effect a seizure they may be open, at most, to some sort of civil action. But this is a far cry from saying that a prosecution will not lie under section 15(1) where there has been an illegal seizure of infringing copies.

Having said that, I would agree with Ajaib Singh J. when he said in *Then Mee Kom,* that a prosecution under section 15(1) is instituted when the person concerned is produced before a Magistrate and charged. I say so because on the plain wording of section 15(4)(b), time begins to run against the prosecution from the date of seizure — an event which in warrant cases can only occur after the laying of the information. Consequently, cases such as *Beardsley* v. *Giddings,*[14] and *Thorpe* v. *Priestnall,*[15] which say that the laying of the information constitutes the institution of the prosecution are inapplicable.

Another point taken by counsel for Kah Wai Sdn. Bhd. was based on Article 13 of our Constitution which provides:

"No person shall be deprived of property save in accordance with the law."

It was submitted that the entire search and seizure in this case violated the above Article.

The case of *Sharma & Ors.* v. *Satish Chandra,*[16] where a similar point was taken based on the corresponding Article 19 of the Indian Constitution puts paid to this submission. It was there held, *inter alia:*

"A power of search and seizure is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction."

At page 302 the Court said:

"No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot *per se* be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of article 19(1)(f) is involved ..."

Before proceeding to a pronouncement of the formal orders I made, I think I should enunciate the principles as to the application for and execution of search warrants generally. They may be stated thus:

1. There are many statutes authorizing the issue of search warrants and the special directions contained therein must be strictly observed. The information and warrant should follow closely the wording of the statutory provision concerned so

that all the relevant matters are placed before the Magistrate and he can duly authorize, and the executing officer be fully aware of, the extent of the available powers.

2. The applicant should place before the Magistrate an information upon oath and a warrant in writing. The information ought properly to be in the form of a deposition stating shortly the facts, rather than a purely formal document in technical language: *Herniman* v. *Smith.*[17]

3. The application is made *ex parte* and the decision whether or not to issue a warrant is a matter for the Magistrate's discretion. The Magistrate has a duty to satisfy himself in all the circumstances that it is right to issue a warrant. He may question the person swearing the information to this end, and although a police officer who applies for the warrant should not be expected to identify his informant, the Magistrate may wish to know what checks have been made on the reliability of his information. If satisfied, the Magistrate will sign the warrant. The information should be taken to the Court office as soon as possible.

4. No action will lie against the person, applying for a search warrant, who acts *bona fide* and without malice, with reasonable cause, and who fully and fairly states his grounds thus resulting in the issue of a warrant (*Hope* v. *Evered,*[18] *Utting* v. *Berney,*[19] *Lea* v. *Charrington*[20]).

5. The warrant may be executed by any person to whom it is directed. The officer must have the warrant in his personal possession at the time of the search to produce it if required (*Galliard* v. *Laxton,*[21] *Codd* v. *Cable.*[22]

In the result, I quashed the order made by the issuing Magistrate directing that the unscheduled articles be returned to the owners through the police and substituted in its place an order that the police authorities be authorised to retain custody and control thereof to facilitate investigations into possible offences in contravention of section 15(1).

Similarly, I varied the order made by the issuing Magistrate as regards the scheduled articles so as to enable the police authorities to continue to retain custody and control thereof, to facilitate investigations into possible offences in contravention of section 15(1).

Finally, I reminded the police authorities of their statutory obligations under section 15(4)(b), namely, that if no proceedings under section 15(1) were instituted within six months of the seizure of the scheduled and/or unscheduled articles, as the case may be, the same shall be returned to the person or persons in whose possession they were when they were seized, or if it was not reasonably practicable to return them to those persons, they should be disposed of in accordance with the law relating to the disposal of lost and unclaimed property.

Order accordingly.

Solicitors: *Asbir, Hira Singh & Co.*

TAN SUAN HEOH v. LIM TECK MING & ORS.

[O.C.J. (Edgar Joseph Jr.J.) August 30, 1985]

[Penang – Originating Motion No. 17 of 1985]

Land Law – Written form for sale and purchase of land – Non-signing of agreement of sale and purchase – Part payment of deposit – Forfeitable if balance of deposit not paid by certain date – Completion date provided – Assignment of rights by purchaser to sub-purchasers – Refusal to complete sale by proprietor – Caveat by sub-purchasers – Whether it should be removed – National Land Code, s. 327(1).

The applicant is the registered proprietor of land comprised in holding No. 1241, section 1, Bandar Tanjong, Penang ("the property"). By a form in writing dated April 16, 1985, addressed to Lee Wah Housing Agency, and signed by one Lim Hor Heang and the applicant, it was provided therein that Lim Hor Heang had paid a part deposit of $2,000 for the purchase of the property for a consideration of $93,000 and that payment of the balance of the deposit of $11,950 was to be made on the signing of the agreement of sale and purchase on or before April 30, 1985, failing which the said sum of $2,000 would be forfeited. The sale was to be completed on or before July 31, 1985. For valuable consideration, Lim Hor Heang purported to assign to the first and second respondents all her rights to purchase the property. On the same day they by their solicitors' letter dated April 26, 1985, gave notice of the assignment to the Housing Agency. The applicant through her solicitors' letter dated May 6, 1985, replied to the solicitors for the first and second respondents, stating that she did not wish to sell the property to them and that she did not accept the purported assignment. The first and second respondents then lodged a caveat against the property. The proprietor applied for its removal, contending that the signing of the agreement of sale and purchase was a condition precedent and that there was no serious question to be tried. Alternatively, the purported assignment or notice was not valid.